

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**CHERYL WELLS**

Claimant

VS.

**RIVERSIDE HEALTH SYSTEMS**

Respondent

AND

**WAUSAU UNDERWRITERS INSURANCE CO.**

Insurance Carrier

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Docket No. 250,309

**ORDER**

Respondent and its insurance carrier appealed the January 23, 2002 Order entered by Administrative Law Judge Jon L. Frobish. The Board reviewed this claim on its summary calendar docket.

**ISSUES**

This is a claim for a January 13, 1998 accident and resulting back injury. By Order dated January 23, 2002, Judge Frobish awarded claimant \$1,375 in post-award attorney fees for the legal services rendered claimant following the final Award in pursuing medical authorization for a programmable intrathecal narcotic pump.

Respondent and its insurance carrier contend the Judge erred. They argue claimant could have requested the intrathecal pump before the case was submitted to the Judge for the final Award. They argue claimant is not entitled to any post-award attorney fees and they cite the Naff<sup>1</sup> decision as their authority. Accordingly, they request the Board to set aside the Order for attorney fees.

Conversely, claimant contends the Naff decision is distinguishable. Claimant argues that at the time of the final Award she was a potential candidate for an intrathecal pump but it was not determined when the pump would actually become necessary to help control her pain. Claimant also argues it was respondent and its insurance carrier's refusal to

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<sup>1</sup> Naff v. Davol, Inc., 28 Kan. App. 2d 726, 20 P.3d 738, *rev. denied* \_\_\_ Kan. \_\_\_ (2001).

provide the continued authorization of Dr. Parks that required the post-award litigation for additional medical treatment. Therefore, claimant requests the Board to uphold the Order for \$1,375 in attorney fees and, in addition, award an additional \$250 (two and one-half hours at \$100 per hour) in fees for the services provided on this appeal. Accordingly, claimant requests a total of \$1,625 in post-award attorney fees.

The only issue in this post-award matter is whether claimant is entitled to an award for attorney fees for pursuing additional medical treatment following the final Award.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, the Board finds and concludes:

The January 23, 2002 Order should be affirmed. Additionally, claimant is entitled to receive an additional \$250 in attorney fees for the services her attorney provided in the appeal to this Board.

The regular hearing in this claim was held on November 15, 2000. In a final Award dated February 26, 2001, Judge Frobish found claimant was permanently and totally disabled from engaging in substantial and gainful employment. That Award was appealed to this Board, which affirmed the Judge's finding in its Order dated October 29, 2001. As part of its findings, the Board stated:

6. Claimant also presented the testimony of Dr. Jon C. Parks, a board-eligible anesthesiologist, who was claimant's authorized treating physician at the time of his December 2000 deposition. The doctor testified that claimant had post-laminectomy syndrome with low back and bilateral L5-S1 radiculopathic pain, and that claimant was being treated with Ibuprofen, Paxil, Xanax, Lorcet, and Soma. Dr. Parks testified that **in the future claimant may need more advanced pain treatment therapy, which might include implanting an intrathecal pump for administering narcotics or implanting a dorsal column stimulator for electrically stimulating the spinal cord.** (Emphasis added.)

Dr. Parks' deposition was taken on December 14, 2000.

Meanwhile, during the time that the appeal of the February 26, 2001 Award was pending before this Board, Dr. Parks admitted claimant into respondent's hospital facilities on May 16, 2001, for an intrathecal pump trial. The May 16, 2001 hospital admission history provides a good summary of the attempts to relieve claimant's ongoing pain:

This 46 year old female has history of post laminectomy syndrome of the lumbar spine with continued low back and bilateral leg pain. She is known to me from ongoing pain management. We have done multiple conservative therapies

including epidural as well as caudal epidural blocks, medications, therapy, and all with very poor ultimate results. She presents today for intrathecal narcotic trial.

Claimant successfully completed the intrathecal pump trial and on May 29, 2001, Dr. Parks advised respondent and its insurance carrier that he would like to proceed with a permanent implant. Respondent and its insurance carrier denied the request, requiring claimant to litigate the issue of additional medical treatment. On June 19, 2001, claimant filed a formal request for additional medical treatment, including the intrathecal pump, with the Division of Workers Compensation. While the medical issue was being litigated, respondent and its insurance carrier required claimant to travel to Overland Park, Kansas, to be evaluated by Dr. Howard A. Aks.

Under K.S.A. 44-536(g), the Judge can assess attorney fees against an employer and its insurance carrier for the legal services rendered an injured worker to obtain additional medical treatment following a final award. But K.S.A. 44-536(g) must be considered in light of the Naff decision. In Naff, the Court of Appeals held that under the facts presented in that particular case, an injured worker was not entitled to an award of attorney fees where medical treatment that was being sought following a final award was actually recommended before the final award was entered. The Court stated, in part:

In this case, the Board was attempting to stop an apparent abuse of the workers compensation system. Instead of pursuing the medical treatment recommended by Dr. Ketchum in June of 1996, Naff proceeded to regular hearing claiming her condition was at maximum medical improvement. She received an award for permanent disability to both her arms and shoulders. Yet, a short time after receiving her award, she decided to pursue the surgery recommended prior to the award.

We recognize Naff's statutory argument concerning the elements of K.S.A. 44-536(g). However, we hold that in a case where medical treatment being sought was recommended prior to the issuance of the original award and the employee choose [sic] not to pursue that medical treatment, it is proper for the Board to require a change in circumstances of the employee's injuries in order to award attorney fees under K.S.A. 44-536(g). Any attorney fees associated with challenging the extent of medical compensation prior to the original award would not have been compensable under these facts. The Board properly recognized that immediately reopening the question, right after the disability determination award for no discernable reason, should not give rise to the awarding of attorney fees under our statutory setup.

Under the facts of this case, we hold the Board did not err in requiring a change in circumstances in order for the attorney to receive attorney fees under K.S.A. 44-536(g).<sup>2</sup>

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<sup>2</sup> Naff, at pages 732 and 733.

The Board concludes that Naff is distinguishable from this claim. In Naff, the Board was attempting to prevent an abuse of the workers compensation system. Conversely, in this claim the Board finds that claimant's request for additional medical treatment and post-award attorney fees does not constitute an attempt to abuse the system. The Board finds that when this claim was submitted to Judge Frobish for an Award, there was only speculation that the intrathecal pump would become appropriate treatment for claimant. After Judge Frobish entered the final Award, Dr. Parks then determined that the pump was appropriate treatment, depending upon the results from a trial application, which was conducted in May 2001. Accordingly, Naff is distinguishable for two reasons: first, claimant is not attempting to abuse the workers compensation system, and second, the circumstances changed following submission of the claim to the Judge as Dr. Parks then determined claimant's condition was such that it was medically appropriate to proceed with the intrathecal narcotics pump.

Accordingly, the Board affirms the Judge's Order that claimant is entitled to \$1,375 for post-award attorney fees. In addition, the Board awards claimant an additional \$250 for the services rendered by her attorney on this appeal.

**WHEREFORE**, the Board affirms the January 23, 2002 Order and, in addition, awards claimant an additional \$250 in attorney fees for the services rendered by her attorney in this appeal, creating a total award of attorney fees of \$1,625.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant  
Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director